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No. 99-422

Supreme Court, U.S.
FILED
NOV 18 1999
CLERK

In The

Supreme Court of the United States

MARSHALL SPIEGEL,

Petitioner,

v.

PROBATE PROCEEDING, WILL OF ABRAHAM WARSASKI, DECEASED,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals, State Of New York

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. THE COURT HAS JURISDICTION TO REVIEW THIS CASE

Respondent asserts that "the constitutional provision cited as a basis for obtaining certiorari was never raised, at either the trial level, the intermediate appellate level or to the New York Court of Appeal." Br. Opp. at 1. This is a mischaracterization. In his Petition for Certiorari, Spiegel highlighted the fact that "the principle of fundamental fairness that is the essence of due process was clearly in play" in the proceedings below. Pet. n.1. Although Spiegel did not explicitly cite the Fourteenth Amendment Due Process Clause previously, he did invoke the principle of fundamental fairness that is central to Fourteenth Amendment analysis when urging the New York Supreme Court that the Surrogate Court's denial of Meenan's motion for admission *pro hac vice* "prevented him from receiving a fair trial." Br. Opp. at 6.

The critical question thus becomes whether the reference to a denial of a fair trial put into play the constitutional question. It did. The Court's precedents on this issue lay out a variety of circumstances in which it can be said that a federal constitutional question is extant. Among these are cases reflecting the Court's position that, where the litigant has referred to the principle at issue without expressly referring to the constitutional provision, a properly raised federal question is present. For example, in *Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978), the Court stated that an objection invoking "fundamental principle[s] of judicial fair play" should have "sufficed to alert the trial judge to petitioner's reliance on

due process principles." Similarly, in *Martinez v. California*, 444 U.S. 277, 282-83 n.6 (1980), the federal question was found to be extant where appellants failed to explicitly refer to a federal constitutional provision, but their response to a demurrer reflected they were relying on a "federally protected right to life."

This pragmatic approach is wholly appropriate given the axiom that due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," but rather "represent[s] a profound attitude of fairness." *Anti-Fascist Comm'n v. McGrath*, 341 U.S. 123, 162-63 (1941) (Frankfurter, J., concurring). Moreover, this approach is especially warranted where, as here, the Surrogate Court's eleventh-hour denial of Meenan's motion preempted Spiegel's opportunity to "have his case fairly presented." *Robinson v. Boeing Company*, 79 F.3d 1053, 1056 (11th Cir. 1996). One month before the trial was to begin Spiegel had an "overriding need" for Meenan's representation. *See id.* That the Surrogate Court's denial of Meenan's motion implicated constitutional due process concerns in the most concrete way is evident when we consider the consequences of that action. Spiegel was left with no other option than to have an ill prepared lawyer try his case. Ms. Rowland's prior involvement in Spiegel's case had been limited to those few (virtually ministerial) acts performed merely as local counsel. She had less than one month to prepare for trial in a case that was so complex it had spent four years in discovery. Not surprisingly, the record reflects grave errors by Ms. Rowland which prejudiced Spiegel's right to a fair hearing.

II. THE SURROGATE COURT'S DENIAL OF THE MOTION FOR *PRO HAC VICE* ADMISSION WAS ARBITRARY AND VIOLATED DUE PROCESS

A. The Surrogate Court's Decision Was Arbitrary

Respondent defends the Surrogate's denial of Meenan's petition for *pro hac vice* admission as coherent. It states: "[T]he record clearly reflects that the motion was denied because Mr. Meenan informed the Surrogate that he would be unable to begin the trial September 5, 1997, the firm trial date that had been scheduled by the Surrogate in May 1997. . . . " Br. Opp. at 7. There are multiple problems with Respondent's argument.

First, the rationale Respondent analyzes is actually that of the New York Supreme Court, not the Surrogate. The Surrogate Court did not refer to Mr. Meenan's inability to begin trial on September 5, 1997, and we have no reason to think that this was a factor in the Surrogate's decision. The trial court's response to Meenan's motion consisted only of the statement that "objectants have had ample opportunity to conduct their pre-trial discovery and over four months notice of the trial date. Objectants are responsible for their failure to promptly retain new counsel and adequately prepare for trial." App. 4. As explained at pages 6-7 of the Petition for Certiorari and reiterated below, this rationale simply is not logical. In this context, the New York Supreme Court's explanation of why the Surrogate Court denied Meenan's motion is relevant only insofar as it functions to highlight the arbitrariness of the Surrogate Court's decision.

Second, the Surrogate Court's rationale for denying Meenan's motion is arbitrary because it bears no relation to the circumstances surrounding Meenan's acts as Spiegel's counsel. The trial court supported its denial of Meenan's motion by stating: "[O]bjectants have had ample opportunity to conduct their pre-trial discovery and over four months notice of the trial date. Objectants are responsible for their failure to promptly retain new counsel and adequately prepare for trial." App. 4. The court's rationale is nonsensical because it refers to facts not present in this case. All parties had proceeded on the understanding that the Surrogate Court had no objection to Meenan trying Spiegel's case. This assumption was reasonable because: *(1)* The court indicated the motion for *pro hac vice* status would be granted if an association were arranged with a New York attorney who would serve as counsel of record; and *(2)* the Surrogate Court expressed no objection to Meenan's involvement in the case during the three months he was diligently preparing for trial. It was only *after* Meenan had engaged in extensive preparation and *after* Meenan sought to confirm the trial court's approval of his *pro hac vice* status that the court abruptly and unexpectedly denied his motion.

The Surrogate Court's rationale fails because Meenan *was* adequately prepared for trial, and Spiegel reasonably believed he *had* retained new counsel. The unfairness in this case resulted from the Surrogate Court's denial of Meenan's motion and not from Spiegel's lack of diligence in preparing his case.

Moreover, the very suggestion that Spiegel failed to ensure his case would be effectively presented is illogical. Obviously, it would have been irrational for Spiegel to

incur the cost of Meenan's representation and jeopardize the success of his case if he had any reason to believe Meenan would be denied *pro hac vice* admission.

Third, the timing of the Surrogate Court's decision contributes to its arbitrariness. If the court had denied the motion in a timely manner, Spiegel may have been able to retain other counsel who would still have had adequate time to prepare the case for trial. *See infra.* Although Spiegel's constitutional right to qualified counsel of choice may nonetheless have been violated, the prejudice would not have been as egregious if Spiegel at least had been able to retain counsel who could have presented his case effectively.

B. The Surrogate Court's Arbitrary Denial of the Motion Violates Due Process

1. Due Process is implicated in this case because there is a qualified right to counsel of choice in a civil proceeding.

Respondent characterizes the Petition for Certiorari as a "desperate attempt to concoct some constitutional argument and thereby obtain the jurisdiction of this Court." Br. Opp. at 1. We are at a loss to understand this claim. As discussed in detail in both the Petition for Certiorari and the *amicus curiae* brief urging this Court's review, a qualified right to counsel of choice in a civil proceeding flows directly from this Court's decision in *Powell v. Alabama*, 287 U.S. 45, 69 (1932) and its progeny, and the decisions of other courts. *See Robinson*, 79 F.3d at 1056; *Hull v. Celanese Corp.*, 513 F.2d 568, 569 (2d Cir.

1975); *Sanders v. Russell*, 401 F.2d 241, 245-46 (5th Cir. 1968).

The import of these decisions is that a state court's discretion in granting or denying *pro hac vice* motions must be tempered by the civil litigant's qualified due process right to counsel of choice. Although courts do have a legitimate interest in ensuring their proceedings are conducted in a fair and timely fashion by qualified counsel, they are *not* free to *arbitrarily* override a motion to appear *pro hac vice*. Thus, Respondent's argument that the Surrogate Court's denial of Meenan's motion for *pro hac vice* admission does not implicate due process is not availing.

2. Respondent's conclusion that the Surrogate Court's denial of the motion to appear *pro hac vice* is valid fails because Respondent ignores Petitioner's qualified due process right to counsel of choice.

The analysis of Respondent in its Brief in Opposition suffers from the same defect as the decisions of the Surrogate Court and the New York Supreme Court. Implicit in each is the premise that because the decision whether to grant *pro hac vice* status rests with courts and is discretionary, a court is free to summarily reject such a motion without considering the adverse consequences on the litigant. Such an approach fails to balance the trial court's interest in ensuring the proper administration of justice with a litigant's qualified right to counsel of choice. Here,

the Surrogate Court should have recognized that the timing of the denial of Meenan's motion could have foreclosed Spiegel's opportunity to have his case effectively presented. Meenan had prepared extensively for the trial. Ms. Rowland was retained by Spiegel solely for the purpose of advising Meenan on points of local procedure. She could not have been expected to adequately present Spiegel's case and the Surrogate should have realized this.

As the *Robinson* Court found, in a case where a litigant's "ability to have its case fairly presented" would be undermined by a court's denial of a motion to add counsel, due process is implicated and the court's interest in time and delay must yield to the litigant's right. *See Robinson*, 79 F.3d at 1055-56. While a court has discretion in ruling on motions for *pro hac vice* admission, that discretion does not translate into a license to deny litigants their federal constitutional right to due process. Thus, a court cannot *arbitrarily* deny a motion for counsel, as did the Surrogate Court in this case, where that decision operates to deny a litigant the representation he needs and is constitutionally entitled to.

To permit the lower court's decision to stand would threaten the continued vitality of the qualified right to select counsel of one's choice in a civil proceeding. A right that can be overridden by a decision as arbitrary as the one in this case effectively has no meaning.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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November 17, 1999